

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2010 MSPB 158

Docket No. CH-0831-09-0922-I-1

**Barbara A. Lambright,
Appellant,**

v.

**Office of Personnel Management,
Agency.**

July 30, 2010

Robert K. James, Jr., Great Lakes, Illinois, for the appellant.

Roxann Johnson, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review of the initial decision affirming the reconsideration decision issued by the Office of Personnel Management (OPM) denying the appellant's claim for a survivor annuity. For the reasons set forth below, we DISMISS the petition for review as untimely filed with no showing of good cause for the delay.

BACKGROUND

¶2 In an August 19, 2009 reconsideration decision, OPM affirmed its initial decision denying the appellant's claim for a monthly survivor annuity based on

the federal service of her deceased husband. Initial Appeal File (IAF), Tab 3, Subtab 2a. The appellant timely appealed to the Board, IAF, Tab 1, and, after holding a telephonic hearing, the administrative judge affirmed OPM's reconsideration decision in a January 15, 2010 initial decision, *id.*, Tab 14, Initial Decision at 4. The initial decision informed the appellant that it would become final on February 19, 2010, unless a petition for review was filed by that date or the Board reopened the case on its own motion. *Id.*

¶3 On April 8, 2010, the appellant filed a petition for review as well as a motion to accept her late-filed petition. Petition for Review (PFR) File, Tab 1 at 1-6, 8. OPM has filed a response in opposition to the appellant's petition for review. PFR File, Tab 4.

ANALYSIS

¶4 A petition for review must be filed within 35 days after the date of issuance of the initial decision, or, if the appellant shows that she received the initial decision more than 5 days after it was issued, within 30 days after the date of receipt. *Williams v. Office of Personnel Management*, [109 M.S.P.R. 237](#), ¶ 7 (2008); [5 C.F.R. § 1201.114](#)(d). Here, as mentioned above, the initial decision was issued on January 15, 2010, and informed the appellant that, to be timely, a petition for review had to be filed on or before February 19, 2010. Initial Decision at 1, 4. The appellant filed her petition for review on April 8, 2010. *See* PFR File, Tab 1 at 1. Thus, as the appellant does not allege that she received the initial decision more than 5 days after it was issued, the petition for review was filed almost 7 weeks late.

¶5 The Board will waive the filing deadline for a petition for review only upon a showing of good cause for the delay in filing. *Lawson v. Department of Homeland Security*, [102 M.S.P.R. 185](#), ¶ 5 (2006); [5 C.F.R. §§ 1201.12, 1201.114](#)(f). To establish good cause for the untimely filing, a party must show that she exercised due diligence or ordinary prudence under the particular

circumstances of the case. *Alonzo v. Department of the Air Force*, [4 M.S.P.R. 180](#), 184 (1980). Factors that are considered in the determination of good cause include the length of the delay, the reasonableness of the excuse and showing of due diligence, whether the appellant is proceeding pro se, and whether she has presented evidence of the existence of circumstances beyond her control that affected her ability to comply with the time limits or of unavoidable casualty or misfortune that similarly shows a causal relationship to her inability to file her petition in a timely manner. *Wyerowski v. Department of Transportation*, [106 M.S.P.R. 7](#), ¶ 7, *aff'd*, 253 F. App'x 950 (Fed. Cir. 2007).

¶6 With her petition for review, the appellant submits a motion to accept her late-filed petition. *See* PFR File, Tab 1 at 8. She asserts that her petition is untimely because she had no money to hire an attorney to assist her. *Id.* She asserts that she therefore provided the papers for filing a petition for review to “family and friends who knew people with a legal education” and “by the time the documents were returned to [her], the time to appeal had expired.” *Id.*

¶7 The Board has held that an inability to afford legal counsel does not excuse an appellant’s failure to timely file a petition for review. *Stewart v. Department of the Navy*, [93 M.S.P.R. 147](#), ¶ 5 (2002); *Barber v. Department of Agriculture*, [63 M.S.P.R. 32](#), 34-35 (1994). Moreover, to the extent the appellant may be asserting that she relied upon a representative to timely file her petition for review, the appellant is responsible for the errors of her chosen representative. *Sofio v. Internal Revenue Service*, [7 M.S.P.R. 667](#), 670 (1981). Even if the appellant is pro se on review,* the filing delay of 7 weeks is not minimal, and the appellant has not demonstrated that she exercised due diligence or ordinary prudence that would justify waiving the deadline for filing a petition for review.

* The appellant designated Robert K. James, Jr., as her representative below, *see* IAF, Tab 8; however, the appellant appears to have submitted her own petition for review, *see* PFR File, Tab 1 at 6-8.

See Barlow v. Department of the Navy, [99 M.S.P.R. 569](#), ¶¶ 4, 9 (2005) (finding that a petition for review that was untimely filed by 9 days must be dismissed as no good cause was shown for the delay). Notably, there is no evidence that the appellant contacted the Board or sought an extension of time in which to file her petition if she was waiting for family and friends to return the papers to her as she asserts. Indeed, none of the arguments and assertions made by the appellant in her motion to accept her late-filed petition suggests the existence of circumstances beyond her control that affected her ability to timely file her petition. *See Wyeroski*, [106 M.S.P.R. 7](#), ¶ 7.

¶8 We find that the appellant has failed to show that she exercised the due diligence or ordinary prudence in this case that would justify waiving the filing deadline. Accordingly, we dismiss the petition for review as untimely filed with no good cause shown for the delay in filing.

ORDER

¶9 This is the final decision of the Merit Systems Protection Board concerning the timeliness of the petition for review. The initial decision will remain the final decision of the Board regarding the merits of the appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) ([5 C.F.R. § 1201.113\(c\)](#)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your

representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, [931 F.2d 1544](#) (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 ([5 U.S.C. § 7703](#)). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.